Supreme Court, U. S.
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79-518

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS (STUDS) TERKEL,

Petitioner,

v.

CLARENCE KELLY, EDWARD LEVI,
The Federal Bureau of Investigation, and the
Department of Justice,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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September 26, 1979

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. _____

LOUIS (STUDS) TERKEL, Petitioner,

v.

CLARENCE KELLY, EDWARD LEVI, The Federal Bureau of Investigation, and the Department of Justice, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Louis (Studs) Terkel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 25, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A herein. The petition for rehearing is Appendix B herein.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division with Frank J. McGarr, Judge presiding, was rendered February 8, 1978 (Appendix C herein).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 25, 1979. A timely petition for rehearing was denied on June 29, 1979, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, NOTABLY IN RAY v. TURNER, 587 F.2d 1195 (D.C. Cir. 1978) AS TO THE PROPER INTERPRETATION OF 5 U.S.C. §552.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE OVERALL ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT.

3. THE DISTRICT COURT SHOULD HAVE MADE A DETERMINATION DE NOVO OF THE APPLICABILITY OF THE ACT'S EXEMPTIONS THROUGH USE OF IN CAMERA INSPECTION OF DOCUMENTS.

STATUTORY PROVISIONS INVOLVED

§552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of

this section, and the burden is on the agency to sustain its actions.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures...

STATEMENT OF THE CASE

By letter dated November 24, 1975, addressed to respondent Kelley, then director of the FBI, petitioner Terkel requested access to his file under the FOIA in the Northern District Court of Illinois. After considerable delay by the FBI beyond the 30 day statutory time for response, Terkel filed suit on April 29, 1976. Eight months after the original complaint, 146 pages of documents were released to Terkel, many of them with portions deleted. Terkel was also informed that other documents were withheld in their entirety. The withholdings were said by the FBI's agents in their affidavits to be pursuant to exemptions allowed by 5 USC 552a (Privacy Act), 5 USC 552(b)(1) [hereinafter (b)(1) or the "national security information" exemption of the

FOIA], 5 USC 552(b)(2) [or the "internal personnel rules and practices" exemption of the FOIA], 5 USC 552(b)(7)(C)(D) or (E) [the "investigatory records" exemption]. Petitioner Terkel subsequently pressed for further disclosure of the withheld materials. After reviewing the affidavits and attachments, the district court granted the government's motion for summary judgment. On appeal the Seventh Circuit remanded for certain limited purposes to allow the government to explain its "symbol numbers" but affirmed in all other respects the holding of the District Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, NOTABLY IN RAY v. TURNER, 587 F.2d 1195 (D.C. Cir. 1978) AS TO THE PROPER INTERPRETATION OF 5 U.S.C. §552.

Section 552 of Title 5, the Freedom of Information Act (FOIA), provides that all records in the possession of agencies of the Executive Branch of the Federal Government must be released unless the information fits within nine specified and narrowly drawn exemptions. For example, one such exemption, relied upon in opinions below, Exemption 1, 5 U.S.C. §552(b)(1), applies to matters that are

> (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

Other such exerptions were employed as well by the Courts below, but their application to the requested documentation summarily approved the wholesale exclusion of materials from disclosure by the FBI in derogation of existing case law particularly as laid down in the case of Ray v. Turner, 587 F.2d 1195 (D.C. Cir. 1978) wherein the Second Circuit said:

> [The Government's] affidavit... purports to link specific exemptions to specific documents. A glaring defect is that it lumps the exemptions together and fails to identify whether different exemptions are claimed as to different parts of each document.
>
> --Ray v. Turner, 587 F.2d 1187, 1196

In the case at bar, not only have the Government's affidavits failed to link specific exemptions to specific documents, there is merely a recitation of which exemptions are applicable to the lot of withheld materials. Such a generalized interpretation of procedures to be followed in the Seventh Circuit with respect to the administration of the FOIA is therefore wholly at odds with the particularized method followed in the District of Columbia Circuit.

Thus, in the District of Columbia Circuit "[t]he statement that the release of any meaningful portion of a 'sensitive intelligence source' has some particularity, but it runs into a failure to address specifically whether the disclosure of substantive information may be possible with the disclosure of source, and if not why not." Ray v. Turner at p. 1196. However, in the Seventh Circuit, the blanket statement that information contained in a requested document "would reveal an intelligence source and reveal the FBI's interest in a foreign relations matter, the continuing protection of which is essential to national security[,]" is apparently sufficient, Terkel v. Kelly at p. 6 (Appendix herein).

Again, the District of Columbia Circuit found in the Ray case that "the CIA again has not been responsive to the requirement that it provide specific affidavits that segregate each of its

claims. The 'exemption by document' approach has been rejected by our opinions, notably Vaughn, 157 U.S. App. D.C. at 345-46, 484 F.2d at 825-26, and Mead Data Central, Inc. v. Dept. of the Air Force ... 566 F.2d 242, 259-62 (1977). The agency may not rely on that approach even in a national security context. The agency must provide a reasonable segregation as to the portions of the document that are involved in each of its claims for exemption. As indicated in Mead, it is important that the affidavit indicate the extent to which each document would be claimed as exempt under each of the exemptions. The courts cannot meaningfully exercise their responsibility under the FOIA unless the government affidavits are as specific as possible." Ray v. Turner, 587 F.2d 1187, 1197.

Nevertheless, the Seventh Circuit has apparently approved the "exemption by document" approach which the District of Columbia Court expressly rejected; nowhere does any single affidavit filed below indicate the extent to which each document would be claimed as exempt under each of the exemptions. Rather, exemptions are lumped together in an index and then cross referenced by page number to a generalized text within an affidavit describing overall the nature of the exemption once for all the hundreds of times it is used, rather than in the context of each use. Terkel v. Kelly, Appendix, p. 6. In fact, the combination of exemptions herein, as disapproved by the District of Columbia Circuit, is the rule for this cause rather than the exception. The conflict between circuits is therefore complete.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE OVERALL ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT.

The Seventh Circuit's opinion in this case reflects important statutory and policy considerations growing out of its bona fide efforts to administer the FOIA, particularly since this Court has not had occasion to address itself

to these matters since the 1974 amendments to 5 U.S.C §552, et. seq. and the Government in the Sunshine Act House Conference Report No. 94-1441, 94th Cong., 2d Sess. 25 (1976); See Government in the Sunshine Act, Pub. L. No. 94-409, §5(b), 90 Stat. 1247 (1976). Tens of thousands of FOIA requests are addressed to the Executive Branch of the Federal Government each year and the number of applications is growing. The sheer volume of cases to be handled in the face of scant guidelines therefore warrants attention.

In passing the FOIA, the Congress made a national commitment to public scrutiny of the federal departments and agencies, and it entrusted the federal courts with implementation of this commitment. Dept. of the Air Force v. Rose, 425 U.S. 352, 360-62, 96 S.Ct. 1592, 48 L.E d 2d 11 (1976). Having authorized but nine exemptions from disclosure of government records, Congress made clear that disclosure, not secrecy, is the dominant objective of the act and that the exemptions should be narrowly drawn to prevent suppression of the national commitment to public disclosure.

However, as J. Skelly Wright, [illegible] Chief Judge of the District of Columbia Circuit has observed in his concurring opinion to Ray v. Turner, supra:

> "...the federal bureaucracy has been extremely reluctant to embrace the principle of public disclosure on which the FOIA is founded and...has succeeded in frustrating much of its implementation -- so much so that Congress has repeatedly overruled court decisions restricting disclosure by amending the Act."
>
> -- Ray v. Turner, 587 F.2d 1195, 1200 (footnote omitted)

Judge Wright continues by noting the confusion in recent court decisions over several passages in the legislature history of the 1974 amendments to the FOIA, particularly in Weisman v. CIA, 565 F.2d 692 (D.C. Cir. 1977). Wright was even critical of the per curiam in Ray which he noted "...fails to ...explain what these general directions mean in practical terms..." Ray, supra, at 1209.

In the Ray case, as in the case at bar, affidavits were submitted which did not indicate that all the material being withheld was exempt under exemption 1,

where applicable. That is to say, the affidavits were deliberately ambiguous, in this respect. In the words of Judge Wright, "The District Court's failure to recognize this problem with the affidavit raises serious doubts about the adequacy of its de novo review." Criticizing these "standard form" affidavits which merely parrot the language of the statute or Executive Order, Judge Wright declares, "When an agency cannot get beyond generalities in its affidavits for fear of revealing too much, de novo review requires the court to employ additional techniques, such as in camera inspection and Ray, supra, at 1218.

Thus, in the face of much confusion by the lower courts, effective management of the enormous volume of FOIA requests suggests that this Court review the decisions below; thus will be assured the government agencies' compliance with Congress' commitment to compel disclosure of information wherever possible. While many of the decisions cited above have brought foreward good suggestions about handling document procedures, a consolidation of the prior cases' wisdom and the legislative history regarding what courts must do to make de novo review a reality would be most welcome. Again, in the words of Judge Wright, "The evolution of the review process must continue; additional creative innovations by counsel, the courts, and Congress are necessary to solve the problems that persist. For the time being, however, the courts can at least see to it that the progress that has already been made is not lost." Ray v. Turner, 587 F.2d 1187, 1222.

3. THE DISTRICT COURT SHOULD HAVE MADE A DETERMINATION DE NOVO OF THE APPLICABILITY OF THE ACT'S EXEMPTIONS THROUGH USE OF IN CAMERA INSPECTION OF DOCUMENTS.

Affidavits have been submitted by the Bureau's agents setting forth criteria for withholding materials under (b)(1) pursuant to Executive Order (EO) 11652, Sections 2(A)(3) and 2(C). EO 11652 has been supplanted by EO 12036 of January 24, 1978, 43 Fed. Reg. No. 18, pp. 3674 et seq. Section 2-208 of EO 12036 makes it clear that no agency

within the Intelligence Community may collect, disseminate or store information concerning the activities of United States persons with eleven exceptions. Plaintiff Terkel has no present means of ascertaining which of these new exceptions, if any, the FBI intends to claim he falls under, however, it is submitted that the FBI should be ordered to comply with EO 12036 and its considerably narrower restrictions for exemption. Nevertheless, even if the FBI asserts that these criteria have been met, the District Court should be ordered to make its own de novo determination, considering the language of the FOIA, the Congressional Conference Committee Report mandating de novo review and authorizing in camera inspection, (Senate Rep. No. 93-1200, 93rd Cong., 2nd Sess), the new EO, and dicta in a D.C. Court of Appeals wire tap case, Zweibon v. Mitchell, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975) cert. denied, 425 U.S. 944 (1976).

In this case virtually none of the criteria applicable, even under the old Executive Order or Classification Review Committee procedures have been followed. Thus, neither the reviewing FBI agents nor the District Court have done other than merely to rubber-stamp original determinations about classification. It is therefore asserted that the District Court and the Bureau must engage in exhaustive reconsideration of this matter with guidelines more rigorous than subjectivity. As the Comptroller General has pointed out, classification of information depends on whether

> "--its release would reveal the use of particularly sensitive and useful techniques,
>
> --a group is active or defunct,
>
> -- more than one informant and/or sensitive sources are involved,
>
> --the information obtained was specific or general,
>
> --the information was gathered at a small meeting or through a large gathering, or
>
> --the information obtained is recent or old."
>
> See Report to the Congress of the United States by the Comptroller General, April 10, 1978 (U.S.

General Accounting Office, Washington, D.C. 20548; GGD-78-51), p. 51.

One may search the record in this case in vain for any meaningful application of the above criteria, to say nothing of more current guidelines.

Plaintiff Terkel has never been shown to be engaged in anything other than constitutionally protected activity. The government's brief, therefore, relying on the merely permissive (not mandatory) exemptions provided in the Privacy Act, is at great odds with pronouncements of former Attorney General Levi who directed that the Department of Justice provide access to documents under the FOIA notwithstanding that such documents might be subject to Privacy Act exemptions. See correspondence between Senator Edward M. Kennedy and Attorney General Edward H. Levi, reprinted in CONG, REC, (daily ed. October 9, 1975) at 518145-518151.

Moreover, the Privacy Act requires agencies to maintain personally identifiable information in conformity with statutory standards of accuracy, relevance, timeliness and completeness; a demand for amendment of any record that is not "accurate, relevant, timely or complete" may be made under §552a(d)(2). In this case, it is obvious that many of the records --Terkel has been followed around for most of this century-- are outdated, inaccurate and irrelevant, yet plaintiff Terkel cannot even obtain the material so that it can be amended.

The government has repeatedly raised the law enforcement purposes exemption of the FOIA as grounds for withholding material. Yet nowhere does the government attribute any lawbreaking or even misconduct to plaintiff Terkel, nor does the government reveal under what authority the FBI has kept surveillance of Terkel all these decades. The Presidential directives invoked by the government do not indicate that any such surveillance program of a peaceful, law-abiding citizen is called for. The same may be said for statutes authorizing Intelligence investigations such as 18 USC 2384, and 28 USC 533.

What seems apparent is that the FBI has opened a pretextual investigation and then sought to protect "informants" who, themselves, have violated plaintiff Terkel's privacy. As Honorable Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation on this case in the Seventh Circuit, declared during oral arguments, "This record reeks of bad faith". Such impropriety turns the protection intended to be afforded under the Privacy Act and the FOIA on its head and makes the legislation itself simply another device for intruding on the innocent. So far the FBI has achieved its objective of forcing the opposition to argue in a vacuum since the contents of the exempt material are undisclosed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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September 26, 1979

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1313

LOUIS (STUDS) TERKEL,

Plaintiff-Appellant,

v.

CLARENCE KELLY, EDWARD LEVI, The Federal Bureau of Investigation, and The Department of Justice,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 1626—**Frank J. McGarr**, *Judge.*

ARGUED DECEMBER 7, 1978—DECIDED MAY 25, 1979

Before TONE, LAY,* and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* This is an appeal arising under the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.* The appellant Louis ("Studs") Terkel requested the Federal Bureau of Investigation to provide him with "a copy of all files in the FBI indexed or maintained under my name and all documents containing my name." The

* The Hon. Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

FBI released 146 pages of documents,[1] but withheld some material under provisions of the Act permitting non-disclosure. Terkel subsequently instituted an action in the district court to compel disclosure of the withheld material. After reviewing the affidavits and attachments, the district court granted the government's motion for summary judgment. On appeal, Terkel argues that the lower court erred in failing to conduct an *in camera* examination of the challenged material.

I.

A brief outline of the relevant statutory framework will provide a useful point of departure. In 1974 Congress amended the FOIA provisions that governed the role of a reviewing court in considering claims of exemptions under the Act. The 1974 revision provided that

> "the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (1974).

The Conference Report accompanying the amendments explained that "[w]hile *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 9 (1974).

In the case at hand, the FBI has relied on several exemptions under the FOIA to withhold various documents or portions thereof from the appellant. One of the claimed exemptions is § 552(b)(1), which, as amended, exempts matters that are "(A) specifically authorized

[1] According to agency affidavits, the FBI had maintained two separate files on the appellant. One was compiled as a background investigation in connection with the appellant's application for employment with the FBI in 1934. The other was compiled in connection with an investigation of the appellant's "activities in support of racial equality and possible Communist causes" from 1945 to 1961.

under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." On the role of the reviewing court in dealing with this exemption, the Conference Committee Report noted that

> "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in Section 552(b)(1) cases under the Freedom of Information law, *will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.*" S. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974) (emphasis added).

In withholding other portions of the documents, the FBI relied on subparagraphs (C), (D) and (E) of § 552(b)(7). As amended, these subparagraphs provide that investigatory records compiled for law enforcement purposes may be withheld if the production of such records would

> "(C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures . . . ."

According to Senator Hart, who introduced the amended version of Exemption 7 on the Senate floor, the purpose of subparagraph (C) is to "protect the privacy of any person who is mentioned in the requested files, and not only the person who is the object of the investigation." *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book, Legislative History, Texts*

and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. 334 (hereinafter cited as Sourcebook). Similarly, the purpose of subparagraph (D) is to protect

> "the identity of a person other than a paid informer . . . if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Conf. Rep. No. 93-1380, 93d Cong., 2d Sess.; Sourcebook, p. 230.

It is noteworthy that under subparagraph (D) the agency can withhold not only the identity of the source but also the "confidential information" that he supplies. As Senator Hart explained:

> "The agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source . . . . *[A]ll the FBI has to do is to state the information was furnished by a confidential source and it is exempt.*" Sourcebook, p. 332 (emphasis added).

It is also significant that courts have construed this provision to apply to commercial institutions and non-federal law enforcement agencies that supply confidential information as well as to individuals. *See Nix v. United States*, 572 F.2d 998, 1005 (4th Cir. 1978); *Church of Scientology of California v. United States*, 410 F. Supp. 1297, 1302-03 (C.D. Cal. 1976).

Finally, the FBI has invoked § 552a(k)(5) of the Privacy Act in withholding certain documents concerning the appellant's application for employment with the FBI. This provision states:

> (k) The head of any agency may promulgate rules . . . to exempt any system of records . . . if the system of records is
>
> > (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, . . . but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information under an express promise that the identity of the source would be held in confidence or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence; . . . ."

Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

II.

As was noted earlier, while the FOIA provides for *in camera* inspections, "it is clear from the legislative history that this section merely 'permit[s] such *in camera* inspection at the discretion of the Court.'" *Weisman v. Central Intelligence Agency*, 565 F.2d 692, 696 (D.C. Cir. 1977). Thus, in determining whether the district court erred in refusing to conduct an *in camera* inspection, the key issue is whether the agency has provided a sufficient description of the contested information to establish that it logically falls within the category of the claimed exemption. *See Ray v. Turner*, 587 F.2d 1195, n.22 (D.C. Cir. 1978).

From our review of the record, we are satisfied that the FBI has dealt with the instant FOIA request in a responsible and conscientious manner. As the lower court stated in its memorandum opinion, the agency has furnished affidavits which contain

> "lengthy, detailed descriptions of all documents released, the nature of portions excised, the statutory source of the exemptions claimed, the reason the exemptions were claimed, and the standards used in applying the exemptions to individual document portions. In addition, the affidavit contains a document-by-document index in which each document is described, deleted portions are outlined as to quantity and general character, the statutory exemption claimed for each portion is notated, and the paragraph in the body of the affidavit which explains the application of the particular exemption to particular kinds of materials is cross-referenced. Further, filed simultaneously with the affidavits were copies of each document released to plaintiff, both in their entirety or with deletions which are clearly visible and from which it can readily be ascertained whether or not such portions are likely to contain the kinds of information the FBI claims they do."

Thus, for example, the index discloses that the agency withheld a part of Document 8[2] on the grounds that the information was currently and properly classified under Executive Order 11652 in the interest of national defense or foreign policy. § 522(b)(1). The affidavit of Special Agent James stated that the information contained in Document 8 "would reveal an intelligence source and reveal the FBI's interest in a foreign relations matter, the continuing protection of which is essential to the national security." The affidavit also stated that the document "was presented to the Departmental Review Committee for classification review on February 1, 1977, and the classification was upheld as to those portions described." We find this description sufficient to establish that the contested information falls within the § 552(b)(1) exemption, par-

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[2] The document is described as an investigative report from the Special Agent in Charge, Chicago, to FBI headquarters, Washington, D.C., dated April 3, 1950.

ticularly since there is nothing in the record to raise the issue of good faith.[3]

By the same token, we find that the agency affidavits have generally provided adequate information to establish that specific and identifiable portions of the challenged documents fall within § 522(b)(2) or §§ 522(b)(7)(C), (D) and (E) of the FOIA, and that other portions fall within § 522a(k)(5) of the Privacy Act. However, we have discovered at least three instances in which the agency has withheld entire pages of investigative reports on the grounds that the pages would disclose the names of investigating agents or the identities of confidential sources.[4] In each of these cases, it is not apparent from the agency's affidavits why the pages cannot be released after the identifying date has been deleted. Accordingly, these pages are appropriately subject to an *in camera* review by the district court.

We note also that on numerous occasions the agency has relied on § 522(b)(7)(D) in withholding the so-called "symbol numbers" of confidential sources. It is not clear to us, however, precisely why these "symbol numbers" represent identifying data. On remand, therefore, the agency should be given an opportunity to explain the ways in which the "symbol numbers" could reveal the identity of a confidential informant.

Accordingly, the case is remanded for the limited purposes set forth above. In all other respects the opinion of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] In this connection, we are mindful that a reviewing court should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S. Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974).

[4] Specifically, Documents 11 (p. 6), 13 (p. 2) and 31 (administrative pages 1-4).

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit, Chicago

Illinois 60604

June 29, 1979.

Before

Hon. Philip W. Tone, Circuit Judge,
Hon. Donald P. Lay, Circuit Judge*
Hon. William J. Bauer, Circuit Judge

LOUIS (STUDS) TERKEL,
Plaintiff-Appellant,
No. 78-1313 vs.
CLARENCE KELLEY, EDWARD LEVI, The Federal Bureau of Investigation, and the Department of Justice, Defendants-Appellees.

On Petition for Rehearing.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Plaintiff-Appellant Louis (Studs) Terkel, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the afore-

said petition for rehearing be, and the same is hereby, DENIED.

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*The Hon. Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOUIS (STUDS) TERKEL, Plaintiff,	)	
v.	)	No. 76 C 1626
CLARENCE KELLY, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

This is an action brought by Louis (Studs) Terkel under the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act, 5 U.S.C. §552a, against the Director of the Federal Bureau of Investigation (hereinafter referred to as the FBI), the Attorney General of the United States, the Department of Justice, and the FBI. Plaintiff seeks, under §552(a)(4)(B) and §552a (g)(1), to compel production of documents in the FBI files which refer to him and which he had requested purusant to 5 U.S.C. §552(a)(3) and

§552a(d)(1).

Plaintiff made his original request for documents in November, 1975. In January, 1976, the FBI responded with a letter advising plaintiff of its backlog in handling Freedom of Information Act requests and of the need for plaintiff to send his notarized sig-nature in order for processing to go forward. In April, 1976, plaintiff sent his notarized signature to the FBI and filed this suit to compel production. Copies of all communication between the parties have been attached to an affidavit filed in support of defendant's motion under consideration here. Eight months after the original complaint was filed, and two months after the filing of the amended complaint, 146 pages of documents were released to the plaintiff, and the plaintiff was informed that excisions had been made from these documents and that other documents were withheld in their entirety, as

exempted by named subsections of the Freedom of Information Act and the Privacy Act. Plaintiff was also advised at that time of the availability of an administrative appeal procedure. In January and February of 1977, additional materials were sent to plaitiff, some being whole documents previously withheld, and others being excised portions of previously released documents. Defendants have now moved for summary judgment, asserting that they have complied with plaintiff's request and have released to him all materials, save those exempted from disclosure by §552 and §552a. In support of their motion, they have filed three affidavits, the first of which is attached to the motion and consists of a lengthy, detailed description of all documents released, the nature of portions excised, the statutory source of the exemptions claimed, the reasons the exemptions were claimed, and the standards used in applying the exemptions to individual document

portions. In addition, the affidavit contains a document-by-document index in which each document is described, deleted portions are outlined as to quantity and general character, the statutory exemption claimed for each portion is notated, and the paragraph in the body of the affidavit which explains the application of the particular exemption to particular kinds of materials is cross-referenced. Further, attached to the affidavit is a copy of each document released to plaintiff, on which the deleted portions are clearly visible and from which it can readily be ascertained whether or not such portions are likely to contina the kinds of information the FBI claims they do. Plaintiff is dissatisfied with this response from the defendants, resists their motion for summary judgment, seeks an in camera inspection of all materials the FBI has withheld, and has filed a separate motion for "detailed itemization, just-

ification, and indexing." The grounds asserted for this motion are essentially the same as those set forth in the memorandum in opposition to defendants' motion for summary judgment.

Plaintiff's main contention is that the defendants have failed adequately to particularize their reasons for denying plaintiff access to portions of requested materials; indeed, plaintiff makes only a minimal attempt to refute the application defendants have made for each exemption they have claimed.

Plaintiff relies especially on Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In that case, the court was quite concerned with what it considered to be the generally unsatisfactory responses government agencies make to requests by citizens under the Freedom of Information Act. The court expressed its appraisal that the situation "may be corrected by assuring government agencies that courts will simply no longer accept conclusory

and generalized allegations of exemptions...but will require a relatively detailed analysis in manageable segments." 484 F.2d at 826. But the record before that court was entirely different than that presented here. There, neither the agency nor the lower court attempted to specify the quantity and nature of material withheld, or to delineate exactly which exemption was being claimed as to each item withheld, "but rather set forth in conclusory terms the Director's opinion that the [materials] were not subject to disclosure. 484 F.2d at 823.

The FBI here, however, appears to have done exactly what the court in Vaughn expected to force government agencies to do; that is, they have fully explained their reasons for applying certain exemptions to certain kinds of materials, indexed those materials to correlate to the explanations, and attached copies of all documents which were released. It is difficult to know

what else could be expected. Plaintiff complains that he finds himself in the "impossible position" of having to argue that he is legally entitled to materials without knowing exactly what those materials are. But defendants are in an equally impossible position of having to demonstrate with particularity -hy they cannot disclose certain materials without in fact disclosing them in the process of the explanation. We are satisfied that the agency here has made a genuine, good-faith attempt at such an explanation. In light of this conviction, we find that the affidavit and attachments are fully adequate for us to make our determination of whether or not the materials withheld were properly within the exemptions set forth in the statutes, and we find that an in camera inspection of the undisclosed items is unnecessary. See 5 U.S.C. §552(a)(4)(B); Environmental Protection Agency v. Mink, 410 U.S. 73, 92 (1973); Vaughn v. Rosen, supra, 824, 825.

It remains, then, to review individually the propriety of the defendants' claim of exemption for each item withheld. After a careful review of the affidavits, the index, and the attached copies of disclosed documents, every detail of which would be too burdensome to repeat here, we have concluded that in each instance, the defendants' claim was justified.

The Wroblewski affidavit states that the FBI had maintained two separate files on plaintiff: one was compiled as a background investigation in connection with plaintiff's application for employment with the FBI in 1934; the other was compiled in connection with an investigation of plaintiff's "activities in support of racial equality and possible Communist causes" during a certain sixteen-year period. (See Wroblewski affidavit, page 4.)

Although plaintiff has made his request for documents and prosecuted this suit solely under the Freedom of In-

formation Act, we believe we cannot ignore the Privacy Act as a source of access to materials, especially since that Act is more specifically directed at an individual's access to government files containing 'information pertaining to him" (see &552a(d)(1)) than is the Freedom of Information Act. Accordingly, we approve of the Justice Department practice of "processing" requests under both statutes in order to permit the greatest degree of access (see Exhibit F, attached to defendants' motion for summary judgment). Such a policy seems virtually to be mandated by the interplay of the two statutes. (See 28 C.F.R. §16.57(a) and (b).)

As to the file containing materials concerning plaintiff's application for exmplyment with the FBI, defendants claimed that portions identifying confidential sources were exempted from disclosure by virtue of §552a(k)(5) (allowing an agency to exempt by rule "investigatory material compiled solely ly for the purpose of determining suit-

ability...for Federal civilian employment...but only to the extent that... disclosure would reveal the identity" of a confidential source). Although the Wroblewski affidavit contains no reference to the appropriate Justice Department regulation implementing this exemption, we find that regulation to be 28 C.F.R. §16.96(a), and that, pursuant thereto, the materials withheld by defendants (see Wroblewski affidavit, pages 6-9) were properly exempted from disclosure by §552a(k)(5).

Although plaintiff makes no objection to the application of the Privacy Act exemption to these materials, it could be argued that, even though these materials fit squarely within an express exemption of that Act, they must still be disclosed under the Freedom of Information Act, which contains no comparable exemption. (Defendants rely on the exemption in that Act for confidential source identification in investigatory materials compiled for law enforcement purposes, §552(b)(7)(D),

but we find that reliance to be misplaced.) Although a leteral reading of the two statutes as two independent means of access might lead to this result, we conclude that one statute must be read in light of the other. When Congress enacted the Privacy Act, it was focusing its attention on files maintained by government agencies and consisting of collections of information about individual citizens, and when it enacted theexemption in §552a (k)(6), it was expressing its judgment that release of confidential source identification in this context was inappropriate. We cannot override this clear Congresssional intent by compelling defendants to disclose through the Freedom of Information Act what the Privacy Act clearly contemplates be exempt. We therefore hold that defendants withheld these materials properly on the basis of §552a(k)(5).

As to the other file maintained on plaintiff (compiled as part of an investigation of plaintiff's support of

racial equality and possibly Communist causes), defendants have withheld certain documents as currently and properly classified under a certain Executive Order (EO 11652) in the interest of national defense or foreign policy. The exemption for such material is found in §(k)(1) in the Privacy Act (§552a(k)(1)) and 28 C.F.R. §16.96(a). In the Freedom of Information Act, the corresponding subsection is (b)(1), (§552(b)(1)). The materials withheld here are clearly within the protection of both statutes. A Justice Department regulation (28 C.F.R. §17.1) provides that classified documents be reviewed periodically to determine whether or not continued classification is warranted, and the James and Taylor affidavits (Exhibits A and B, attached to defendants' motion) demonstrate compliance with that regulation.

Defendants have withheld certain portions of documents in this file by virtue of the statutory exemptions for

investigatiory records compiled for law enforcement purposes. (See §552a(k)(2) and §552(b)(7).) Defendants have not relied on the broad exemption found in the body of §(k)(2) of the Privacy Act, but have instead withheld materials only to the extent warranted by the more narrow restrictions of the §(b)(7) of the Freedom of Information Act. The names of third-party associates of plaintiff, of third parties interviewed by the FBI in its investigation of plaintiff, and of FBI personnel and local police officers have been withheld on the ground that disclosure would constitute an unwarranted invasion of privacy as to these persons, within the meaning of §552(b)(7)(c). The names of persons interviewed, local law enforcement agencies, and commercial institutions, have been withheld by virtue of the protection given confidential sources by §552(b)(7)(D). Materials that would reveal the nature of currently used investigatory techniques have been withheld pursuant to §552(b)(7)(E).

Lastly, defendants have relied on the

exemption in §(b)(2) of the Freedom of Information Act (materials revealing internal personnel rules and practices) to withold purely administrative matters, such as file numbers, character-of-case notations, mailing routes, names of supervisory personnel, and informants' numbers. Although there is no corresponding exemption in the Privacy Act, we find that reliance on the exemption in the Freedom of Information Act presents no conflict with §(q) of the Privacy Act (prohibiting an agency from relying on any exemption contained in §552 to withhold from an individual any record which is "otherwise accessible' to him under §552), inasmuch as these are not matters "pertaining to" plaintiff, such that he would be entitled to them by virtue of the Privacy Act.

We find that defendants have acted within the scope of their statutory protection as to each instance in which they

have withheld documents or portions from disclosure to plaintiff. Accordingly, there being no genuine issue of material fact, and defendants being entitled to judgment as a matter of law, defendants' motion for summary judgment is granted. Plaintiff's motion for more detailed justification (Vaughn motion) is denied. Defendants' motion to dismiss and for stay of proceedings, previously filed, has been withdrawn. The court having found that plaintiff has received all of the information he is entitled to, and having granted defendants' motion for summary judgment, further proceedings are unnecessary in the case and the complaint is hereby dismissed as satisfied.

ENTER:

/S/ Frank J. McGarr
UNITED STATES DISTRICT JUDGE

DATED: September 26, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Department of Justice, Freedom of Information Division, Washington, D.C.. Counsel for the respondent. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
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No. 79-518

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS (STUDS) TERKEL, PETITIONER

v.

WILLIAM WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 599 F. 2d 214. The opinion of the district court (Pet. App. 1c-15c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1979, and a petition for rehearing was denied on June 29, 1979 (Pet. App. 1b-2b). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a Freedom of Information Act suit in which the district court had sustained the FBI's exemption claims on the basis of a detailed index and

affidavits, the court of appeals ordered an insufficiently broad remand for in camera inspection of certain documents and additional justifications for deletions.

STATEMENT

1. On November 24, 1975, petitioner requested from the FBI, pursuant to the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), "a copy of all files in the FBI indexed or maintained under my name and all documents containing my name" (Pet. App. 1a, 2c). In January 1976, the FBI responded with a letter advising petitioner of its backlog of unprocessed FOIA requests and asking for his notarized signature, which was needed before processing of his request could begin (*id.* at 2c). In April 1976, petitioner sent his signature but also filed this suit in the United States District Court for the Northern District of Illinois to compel production of the requested documents (*ibid.*).

The FBI released 146 pages of documents to petitioner in December 1976. It noted, however, that, pursuant to specified FOIA exemptions, deletions had been made in some documents and other documents comprehended by the request had been withheld in their entirety. Additional documents were released in the next two months (Pet. App. 3c). The government thereupon moved for summary judgment, supporting its motion with three affidavits. Two of the affidavits concerned the security classifications, under Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Compilation), of certain documents withheld under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1) (Pet. App. 12c).[1] The third affidavit

[1]5 U.S.C. 552(b)(1)(A) exempts from mandatory disclosure documents that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order."

("the Wroblewski affidavit") explained the types of FBI documents that fell within petitioner's FOIA request and the theories used in applying the claimed exemptions to the materials withheld (Pet. App. 3c, 6c, 8c).[2] Attached to this affidavit was an itemized list providing a general description of each document withheld in whole or in part, describing as to each page on which a deletion was made the nature of the deleted material and the exemption or exemptions claimed, and cross-referencing each exemption to the paragraph in the affidavit explaining the theory on which the exemption was claimed (*id.* at 6a, 3c-4c).

The district court granted the government's motion, finding that the FBI's reliance on Exemptions 1, 2, and 7(C), (D) and (E) of the FOIA, 5 U.S.C. 552(b)(1), (b)(2), (b)(7)(C), (b)(7)(D) and (b)(7)(E), and on Exemption (k)(5) of the Privacy Act of 1974, 5 U.S.C. 552a(k)(5), was justified by the detailed affidavits and index (Pet. App. 8c-15c).

2. The court of appeals affirmed in part, but remanded the case for the limited purpose of requiring the government (i) to justify, in three instances, the withholding of an entire page of a document to protect the identity of confidential informants and investigating agents and (ii) in the case of "numerous" documents, to explain why disclosing " 'symbol numbers' " of informants might reveal their identities (Pet. App. 7a). The court observed that the three pages withheld to protect

[2]The affidavit explained that the FBI had maintained two files on petitioner—one compiled in connection with his application, in 1934, for employment with the FBI, and the other compiled in connection with an investigation of his " 'activities in support of racial equality and possible Communist causes' "from 1945 to 1961" (Pet. App. 2a n.1).

identities of agents and informants would be "appropriately subject to an in camera review by the district court" (Pet. App. 7a). As to the remainder of the withheld material, the court of appeals agreed with the district court that the detailed index and affidavits adequately established the exempt status of the material (*id.* at 5a-7a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the ruling of any other court. Because the decision turns on a determination whether identifications of particular pages of excised documents or portions thereof provide an adequate basis for determining the exempt status of the deleted material, the case does not present any legal issue of sufficient significance to warrant review by this Court.

1. Petitioner contends (Pet. 8-12) that the decision of the court of appeals conflicts with *Ray* v. *Turner*, 587 F. 2d 1187 (D.C. Cir. 1978), with respect to the treatment of index entries that list more than one exemption for a single document. This contention is meritless.

As petitioner notes (Pet. 9-10), the *Ray* court deemed inadequate the written justifications for exemptions claimed by the CIA for certain documents because the justifications "lump[ed] the exemptions together," "fail[ed] to identify whether different exemptions [were] claimed as to different parts of each document," and, in some cases, failed "to address specifically whether the disclosure of substantive information may [have been] possible without the disclosure of [an intelligence] source" (587 F. 2d at 1196). But the deletion descriptions in the document index filed in the present case are far

more complete than those described in *Ray*. As the district court noted (Pet. App. 3c-4c):

> [The Wroblewski affidavit] consists of a lengthy, detailed description of all documents released, the nature of portions excised, the statutory source of the exemptions claimed, the reasons the exemptions were claimed, and the standards used in applying the exemptions to individual document portions. In addition, the affidavit contains a document-by-document index in which each document is described, deleted portions are outlined as to quantity and general character, the statutory exemption claimed for each portion is notated, and the paragraph in the body of the affidavit which explains the application of the particular exemption to particular kinds of materials is cross-referenced. Further, attached to the affidavit is a copy of each document released to plaintiff, on which the deleted portions are clearly visible and from which it can readily be ascertained whether or not such portions are likely to contain the kinds of information the FBI claims they do.

The format used for the Wroblewski affidavit and index supplies substantially more information about particular exemption claims than was provided in *Ray*. In the case of multiple exemption claims, the description of deleted material in the document index, together with the detailed explanations in the Wroblewski affidavit of the types of material the FBI considers covered by a given exemption, clearly relate each deletion or withholding to a separate exemption claim.[3]

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[3]Take, for example, Document 5 on the list of documents from the file relating to petitioner's support of certain "causes" (Exh. A to Defendants' Motion for Summary Judgment, at page 30). Three

Hence, the court of appeals was not necessarily applying a standard different from that employed in *Ray*, but was merely considering index entries that more clearly suggested the nature of particular deletions. The court below was fully sensitive to the problem of possibly overbroad deletions, as demonstrated by the terms of its remand (see pages 3-4, *supra*). In sum, petitioner is simply asking this Court to review the essentially factual determination of both lower courts that the deleted or withheld documents specified in the FBI index entries "are likely to contain the kinds of information the FBI claims they do" (Pet. App. 4c).

2. Petitioner also contends (Pet. 16-21) that the district court erred in upholding the FBI's exemption claims without itself inspecting the withheld material in camera. As the court of appeals correctly noted (Pet. App. 5a), however, although the FOIA provides for in camera inspection in 5 U.S.C. 552(a)(4)(B), the legislative history of that provision clearly explains that the determination whether to undertake an inspection in any

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separate exemptions are claimed for material deleted on page 1 of the document, and each exemption is expressly tied to a description of the material deleted pursuant to that exemption. With respect to page 3 of that document, two exemptions—(b)(2), relating to internal personnel and administrative matters, and (b)(7)(D), relating to information that would disclose the identity of a confidential source—are listed as applicable to the "[s]ymbol numbers of 5 confidential sources." The cross-reference to the corresponding sections of the Wroblewski's affidavit (paras. 14(B) and 14(D)(1)) makes clear that (b)(2) was claimed because the symbol numbers are considered indicators of "FBI administrative practices regarding the handling of informants" and (b)(7)(D) was claimed because the numbers are identifications of confidential sources. A third exemption claimed for material deleted on page 3 also under (b)(7)(D)—is set forth on a separate line, and the information to which it applies is described in a separate entry.

given case is confided to the sound discretion of the district court. See H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 9 (1974); *Weissman* v. *CIA*, 565 F. 2d 692, 696 (D.C. Cir. 1977). Even under the District of Columbia Circuit's approach, the district court would have abused its discretion in refusing to make an in camera inspection only if the FBI had failed to provide descriptions of the deleted information sufficient to establish that it properly fell into the category of the exemption indicated, or if there was a "record * * * showing of bad faith." *Ray* v. *Turner*, *supra*, 587 F. 2d at 1195. Accord, *Weissman* v. *CIA*, *supra*, 565 F. 2d at 697. As noted above, the FBI provided detailed descriptions of all deleted materials, and the court of appeals expressly stated (Pet. App. 7a) that there was nothing in the record to suggest a lack of good faith.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
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DECEMBER 1979

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[4]The court of appeals also observed that "the FBI has dealt with the instant FOIA request in a responsible and conscientious manner" (Pet. App. 5a). The court did specify in connection with its remand order that an in camera inspection might be appropriate in regard to a few documents to determine whether certain deletions were broader than necessary to protect the intersts implicated in the particular exemption claimed.

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